L/llb

Mailed
2/25/02

Decision 02-02-048 February 21, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application by Pacific Bell Telephone Company (U 1001 C) for Arbitration of an Interconnection Agreement with MCImetro Access Transmission Services, L.L.C. (U 5253 C) Pursuant to Section 252(b) of the Telecommunications Act of 1996.	A.01-01-010 (Filed January 8, 2001)

ORDER DENYING THE REHEARING OF DECISION 01-09-054

I. SUMMARY

In this Order, the Commission denies the rehearing application by Pacific Bell ("Pacific") of D.01-09-054 ("the Decision"). The Decision approves the Final Arbitrator's Report ("FAR"), which provides, among other things, that Pacific is required to offer its retail intraLATA toll service to customers that choose to take local service from MCImetro Access Transmission Services, L.L.C. ("MCIm"), a competitive local exchange carrier (CLEC).

II. FACTS

Pacific filed an application to arbitrate an interconnection agreement (ICA) with MCIm on January 8, 2001. Arbitration hearings were held on March 12-15, 2001, and March 20-27, 2001. Briefs were filed on April 24, 2001, and the Draft Arbitrator's Report (DAR) was filed on June 4, 2001. MCIm filed comments on the DAR on June 14, 2001, and Pacific filed on June 20, 2001. The Administrative Law Judge released the FAR on July 16, 2001. Pursuant to Rule 4.2 of Resolution ALJ 181, Pacific was required to file a statement regarding whether or not the conformed agreement complies with the requirements of the Commission, the FCC, or the Telecommunications Act of 1996 ("the

Act").[1] On August 15, 2001, Pacific filed the public version of its "Statement of Pacific Bell Telephone Company (U-1001-C) Regarding Whether the Interconnection Agreement Resulting from this Proceeding Should Be Approved or Rejected by the Commission ("Statement")," without raising the issue of whether it is legal error for the Commission to require Pacific to offer its retail intraLATA toll service to MCIm's end users (Issue UNE-29).[2] MCIm filed its original Statement on August 15, 2001, and a corrected version on September 4, 2001. The conformed agreement was filed with the Commission on August 15, 2001. On September 21, 2001, the Commission issued D.01-09-054, approving the FAR. The interconnection agreement between Pacific and MCIm was executed on September 25, 2001 (as required by Ordering Paragraph 1, which mandates signing within five days of the date of the order).

On October 22, 2001, Pacific timely filed an application for the rehearing of D.01-09-054, alleging that the Commission erred in requiring Pacific to carry the intraLATA toll traffic of end-users that have selected MCIm as their local service provider. MCIm filed its response to the application for rehearing on November 6, 2001. MCIm denies that there is legal error, and agrees with the FAR's finding that it is discriminatory for Pacific to refuse to provide intraLATA toll service. MCIm further asserts that Pacific's legal arguments should be given little or no weight because Pacific failed to raise them in the statement it was required to submit when the ICA was filed.

III. DISCUSSION

Pacific's rehearing application has no merit. Pacific contends it is error for the Commission to require it to offer a retail service to MCIm's "end users." The retail service in question is intraLATA toll. For Pacific's theory of error to work, it must ignore FCC Rule §51.209. That is precisely what Pacific did.

[1] Pub. L. No. 104-104, 110 Stat. 56 (1996), codified as 47 U.S.C. §251 et seq.

[2] Pacific filed a public version of its Statement, as well as a proprietary one.

Under the FCC's toll dialing parity rules, all local exchange customers must be provided a choice of at least two toll carriers: a carrier for intraLATA toll service and one for interLATA toll.[3] Specifically, Rule §51.209(b) provides as follows:

> A LEC shall implement toll dialing parity through a presubscription process that permits a customer to select a carrier to which all designated calls on a customer's line will be routed automatically. LECs shall allow a customer to presubscribe, at a minimum, to one telecommunications carrier for all interLATA toll calls and to presubscribe to the same or to another telecommunications carrier for all intraLATA toll calls.[4]

Pacific and all other LECs are subject to the FCC's intraLATA toll dialing parity requirements. ILECs may not deprive local exchange customers of their choice of the same or different carriers for intraLATA or interLATA toll by tying together local service and intraLATA toll service. The conclusion reached in the FAR is correct:

> Pacific does have a legal obligation to provide intraLATA service to any requesting customer within its service territory. Pacific is authorized by this Commission to provide intraLATA toll service throughout its service territory. *Since Pacific is holding itself out as an intraLATA carrier, it cannot deny service to a customer, merely because that customer receives its local service from another certificated carrier*.

(FAR, *mimeo*, p. 131; emphasis added.)

Pacific points to Section 251(b)(1) to support its claims of legal error, but this statutory provision detracts from, rather than supports, Pacific's arguments. (Pacific's Rhg. App. at 1, n. 2.) Section 251(b)(1) prohibits ILECs from placing unreasonable restrictions on a CLEC's resale of the ILEC's telecommunications services.

[3] This is known as the two-PIC (primary interexchange carrier) method.

[4] 47 CFR §51.209. By this rule, the FCC is implementing the two-PIC method by requiring that a local exchange customer must be allowed to choose the same intraLATA and interLATA carrier, or one intraLATA carrier and a different interLATA carrier of his choice.

By excluding intraLATA toll service from the interconnection agreement, Pacific would in fact make it unreasonably difficult for MCIm to resell the services MCIm purchased from Pacific. Such a restriction is unreasonable. We concur with MCIm that such a restriction would reduce the value of the local service MCIm could offer.

Pacific further asserts that intraLATA toll is not an unbundled network element (UNE). We do not dispute this. MCIm's request to include language in the parties' UNE Appendix was allowed because it relates to UNEs. It is of no further significance.

Finally, Pacific laments that "this arbitration would amount to the first time that Pacific Bell has been directed to provide a stand-alone toll service to the *end-users* of CLECs." (Pacific Rhg. App. at 3; emphasis added.) This is not an assertion of legal error, and therefore is not a basis for rehearing.

IV. CONCLUSION

The Commission has reviewed all the allegations of legal error put forth by Pacific, and has determined that good cause does not exist to grant rehearing. Therefore,

IT IS ORDERED that:

1. The rehearing of D.01-09-054 is denied.
2. This proceeding is closed.

This order is effective today.

Dated February 21, 2002 at San Francisco, California.

LORETTA M. LYNCH
President
RICHARD A. BILAS
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners

I will file a dissent.

/s/ HENRY M. DUQUE
Commissioner

Commissioner Henry M. Duque dissenting:

Pacific Bell has established a sufficient basis to grant rehearing of Decision 01-09-054. The Commission's denial of rehearing is flawed and unsupportable by the rules it attempts to apply.

In denying the rehearing application of Pacific Bell, the majority decision relies on FCC Rule 51.209 (the dialing parity rule) and Section 251 (b)(1) of the Telecommunications Act of 1996. Neither of these provisions imposes a requirement that Pacific provide intraLATA toll service to a CLEC's customer.

FCC Rule 51.209 establishes that local exchange carriers shall allow a customer to presubscribe, at a minimum to one telecommunications carrier for all interLATA toll calls and to the same or to another telecommunications carrier for all intraLATA calls. The majority order misreads this rule to represent that the customer, by fiat, must have *a choice* for its intraLATA service and that choice *must be* provided by a particular carrier, in this case, Pacific Bell.

In a misreading of Section 251(b)(1), the majority similarly commits error by treating Pacific's exclusion of intraLATA toll service as an unreasonable restriction on a CLEC's resale of a CLEC's resale of the ILEC's telecommunications service.

Neither the FCC nor this Commission has ever treated IntraLATA toll service as UNE. The majority's treatment of this service as such is unsupportable and over-stretches the applicability of the above rules beyond the boundaries of legality.

For these reasons, I cannot support this decision.

/s/ HENRY M. DUQUE
Henry M. Duque
Commissioner

February 21, 2002
San Francisco, California